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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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REPLY BRIEF OF PETITIONER

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The bulk of respondents' brief in opposition consists of procedural arguments that are both factually and legally incorrect. These strawman arguments are raised in a transparent attempt to preclude this Court from reviewing issues of obvious substantive importance. As if their need to distort the record below and their reliance on flimsy arguments were not sufficiently revealing of the weakness of their position, respondents only barely address the several substantive arguments made by petitioner TXO Production Corp. ("TXO"). They make *no*

attempt to refute the existence of conflicts in both state and federal courts over what sort of post-trial review is required under the Fourteenth Amendment and *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), and over the appropriate size of punitive awards. Additionally, by their lack of discussion of the subject, they as much as concede that the punitive award here, 526 times larger than the compensatory award, was unconstitutionally disproportionate. In short, respondents simply present no reason for this Court to deny TXO's petition.

1. Respondents claim that TXO somehow waived the issue of the retroactivity of *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). This claim required respondents blatantly to misrepresent the record below, and is wholly without merit.

In order to "prove" that this argument has been waived, respondents focus solely, and somewhat desperately, on one sentence of TXO's *reply* brief. Respondents ignore TXO's opening brief on appeal to the West Virginia Supreme Court, where TXO discussed the fact that "the procedural requirements established in [*Garnes*] were not followed." Reply App.,[1] *infra*, at 1a-6a; see also *id.* at 4a (noting that TXO's post-trial motions concerning many of the *Garnes* factors were summarily denied from the bench).

Moreover—and importantly—TXO's argument was passed upon by the West Virginia Supreme Court. Pet. App. 32a ("The first issue that we must consider in this regard is the applicability of *Garnes* v. *Fleming Landfill*, —— W.Va. ——, 413 S.E.2d 897 (1991) to those cases still on appeal that were decided before we

[1] Attached as Appendix A to this reply brief is an excerpt of TXO's opening brief on appeal to the West Virginia Supreme Court. TXO has attached this excerpt to demonstrate that, contrary to respondents' assertions, TXO plainly presented full argument on the retroactivity of *Garnes* to the West Virginia court.

handed down our decision in *Garnes*"). It is well established that "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436-37 (1959). Thus, the retroactivity issue was not only raised below, but also duly considered by the West Virginia Supreme Court. Respondents' argument is therefore wholly without merit.

2. As demonstrated above, TXO quite clearly argued that the West Virginia Supreme Court was required to apply *Garnes* retroactively, and, equally clearly, the West Virginia Supreme Court rejected that argument. Respondents nonetheless contend that TXO's citation of *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in support of that issue is somehow precluded.

Before the West Virginia Supreme Court, TXO argued that Due Process standards could be satisfied only by the application of the *Garnes* federal procedural requirements to this case. In response to this Due Process argument, the supreme court held that TXO's rights were outweighed by the burden of having to "send far too many cases back for retrial." Pet. App. 32a. Accordingly, the West Virginia Supreme Court directly rejected TXO's Fourteenth Amendment argument.

To bolster their position, respondents apparently seek to create of whole cloth a new procedural rule for this Court, that no authority may be cited in support of a previously raised argument unless that precise authority also was previously cited. Parties, however, "are not confined . . . to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). When a particular "constitutional premise" was raised below—and rejected by the court, as it clearly was here—petitioner is free to present to this Court a different "method of analysis readily available to the state court." *Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972). TXO's

citation to *James Beam* as authority supporting its previously raised argument is thus entirely appropriate.

3. Contrary to respondents' urgings, *James Beam* should be found to apply to this state court decision because *Garnes* created a new, federally mandated procedure. As discussed by TXO in its petition, *James Beam* stands for the proposition that a federal court may not announce a new federal rule, yet decline to apply that rule to cases arising on facts predating the announcement of that rule. See Pet. 18. In *Garnes*, the West Virginia Supreme Court announced a new procedure for awarding punitive damages in that state, *mandated by the Federal Constitution*, and applied that new rule to the *Garnes* litigants. The court then declined to apply that rule to TXO, a case arising on facts predating the *Garnes* decision. Thus, the analogy to the *James Beam* rule is a precise one, and this Court should clarify that the *James Beam* holding applies equally to *state* court decisions announcing new federal rules.

Respondents answer the wrong question by discussing whether *Haslip* in fact "create[d] new federal law or procedure." Opp. 4. Rather, the question is whether *Garnes* created new, federally mandated procedure in West Virginia. It unquestionably did. The supreme court stated in *Garnes*, "Following the dictates of *Haslip*, we here set out a new system for the review of punitive damages awards in West Virginia." 413 S.E.2d at 908. Indeed, in its opinion in this case, the court noted, "We set out these [*Garnes*] guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*, *supra*." Pet. App. 35a. Accord, *Hinerman* v. *The Daily Gazette Co.*, 1992 WL 166350, at *14 (W. Va. July 15, 1992). Therefore, the teaching of *Felder* v. *Casey*, 487 U.S. 131 (1988), that a "'federal right cannot be defeated by the forms of local practice,'" *id.* at 138 (citation omitted), mandates that the rule of *James Beam* be applied here, and retroactive effect be given to *Garnes*.

4. As set forth in TXO's petition, the results of over one and one-half years of interpretation of *Haslip* by the lower courts make clear that the time is ripe to clarify further the requirements of due process in the context of punitive damages. Respondents do not—and cannot—deny that conflicts and confusion are widespread among the lower courts. In its petition, TXO cited cases squarely conflicting with the trial court's summary approval of punitive damages (Pet. 9-11), as well as with the West Virginia Supreme Court's cavalier approval of the enormous punitive damages against TXO (Pet. 15-17). TXO also cited cases demonstrating that excessive punitive awards have been approved in both state and federal courts notwithstanding *Haslip* (Pet. 13 n.10), and cases in which state and federal courts have effectively given blanket endorsement to a wide variety of punitive damages schemes, often virtually devoid of the checks found in *Haslip* (Pet. 13 n.11). These extensive citations are not countered in any way by respondents, who conclusorily assert only that "[t]here is no reason for this Court to revisit the punitive damages issue . . . ." Opp. 6. On this, respondents are clearly wrong.

5. Respondents' suggestion that TXO was afforded all required procedural protections flies in the face of the facts and simple logic. The "general concerns of reasonableness and adequate guidance from the court" called for by *Haslip* have been utterly disregarded in this case. 111 S. Ct. at 1043. Plainly, the review afforded to TXO in no way came near either the multilevel review afforded in *Haslip* or the procedures mandated by and followed in *Garnes*. Here, the trial court conducted no recorded post-trial review whatever. On review, the supreme court then proceeded to supplant the detailed *Garnes* criteria with its new "really mean"/"really stupid" defendant test. That

standardless approach constitutes an abandonment [2] of the West Virginia court's earlier attempt to provide objective and principled criteria for application by *both* the trial court and the appellate court in reviewing punitive damages awards. The contrast between those criteria and the vague and subjective "really mean"/"really stupid" defendant test is stark; the result of the application of the latter "test" in this case is shocking.

6. Respondents argue that the lack of procedural safeguards afforded TXO constituted some kind of "harmless error." But this is nothing short of a wholesale rejection of the entire effort to place meaningful contraints on punitive awards through procedural means, an effort promoted by this Court in *Haslip*.

Moreover, respondents' argument ignores the stunning size of the $10 million in punitive damages, 526 times the compensatory damages,[3] that were awarded and cursorily approved in this case. Had the trial court conducted an independent and searching review, as required by *Garnes* and by the Alabama procedure reviewed by this Court in *Haslip*, it cannot be assumed that this excessive award would have been sanctioned. Likewise, this extreme award might well have been rejected if the West Virginia Supreme Court had itself undertaken a sober and methodical evaluation of the criteria it set forth in *Garnes*,

[2] At least one recent case demonstrates that the West Virginia Supreme Court intends to continue to apply its "really mean"/"really stupid" defendant test in evaluating punitive awards. In *Hinerman* v. *The Daily Gazette Co.*, the West Virginia court upheld punitive damages in a libel case, stating that "in this case far greater punitive damages could be sustained on appeal because the evidence indicates that the defendant moved from the 'really stupid' category discussed in *TXO* to the 'really mean' category." 1992 WL 166351, at *13-*14 (Neely, J.) (citing *TXO*).

[3] The disparity between the sizes of the punitive and compensatory awards also raises a substantive due process issue, which was addressed by TXO in its petition. Pet. 14-17. TXO's arguments have not been countered by respondents.

rather than relying principally on its determination that TXO's award was acceptable under the essentially unlimited "guideline" for "really mean" defendants. Certainly, had the award been reviewed in West Virginia's sister state of Maryland, it would not have passed muster. See *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991) (award 50 times the compensatory award unconstitutional under *Haslip*), *cert. denied*, 605 A.2d 137 (Md. 1992). Cf. also *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991) (remittitur required of $25 million punitive award, 2.77 times larger than compensatory award, because it was shocking and bore "no necessary relation to the actual harm caused"), *cert. denied*, 112 S. Ct. 1941 (1992).

CONCLUSION

For the foregoing reasons, and for the reasons stated in TXO's petition for a writ of certiorari, this Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

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Pages 44-49 of Brief of Appellant TXO Production Corp. filed in the Supreme Court of Appeals of West Virginia (Dec. 16, 1991):

[44] The facts of the present case call for the application of the general rule stated in *Fleming Landfill* and a setting aside of the punitive damage award.

> 4. Even if the attorney fee award is considered as actual harm or compensatory damages, the punitive damage award is disproportionate, excessive and unconstitutional. In addition, the procedural requirements established in Fleming Landfill were not followed.

Syllabus points 3 and 4 of *Fleming Landfill* set forth the new standard for evaluating the excessiveness of punitive damage awards, as follows:

* * * *

> 3. When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions,

whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt [45] settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

4. When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will

make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

* * * *

[46] With respect to the analysis of syllabus point 3, the jury instructions relative to damages do not meet the test.

The only instruction given the jury regarding punitive damages was Defendant's Instruction No. 6A:

In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such pun-

ishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of the large means than it would upon one of ordinary means under the same or similar circumstances.

Leach v. Biscayne Oil and Gas Co., Inc., 289 S.E.2d 197 (W.Va. 1982); Harless v. First National Bank in Fairmont, 289 S.E.2d 692 (W.Va. 1982); Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982).

Syllabus point 4 of *Fleming* instructs the trial court to apply the five factors to be considered by the jury and four [47] additional factors for the trial court's review in evaluating the excessiveness of a punitive damage award. When reviewing the jury's punitive damage award, the trial court is to set out the reasons for changing (or not changing) the award. *Fleming Landfill*, slip op. at 28. Since *Fleming* was not in effect at the time of trial, TXO moved for judgment notwithstanding the verdict or a new trial, or in the alternative for remittitur based upon the pre-*Fleming Landfill* standard. R. 2100-2107, 2123-2167. However, at the hearing on the post-trial motions TXO argued the lack of harm, the outrageous disproportionality, the excessiveness in light of comparable or analogous case law, that any alleged injury was temporary since TXO filed a quiet title action and the court promptly cleared title, the lack of any personal injury, mental anguish or publication to a third party causing damage to reputation, the lack of any personal gain or profit to TXO, and other factors pertinent to an analysis of the punitive damages. TXO also argued the unconstitutionality of the excessive award and the lack of meaningful standards for the jury and the trial court. Tr. 792-810; R. 2123-2167. The Court summarily denied the post-trial motions from the bench. Tr. 818. The trial court's failure to state the reasons for denying these motions by itself requires reversal. *Fleming Landfill.*

With respect to syllabus point 4, the issue of the costs of litigation were discussed in terms of the attorney fees equalling $19,000, which of course the appellees were awarded. No criminal sanctions were imposed or applied. No other civil actions [48] based on the "same conduct" were presented to the Court. A remittitur motion was presented to the Court, but also rejected summarily. Tr. 815-818. The Court reasoned that TXO could have settled for $5 million before trial, consequently they could have "saved" $5 million. Tr. 816. This, however, avoids the question of the reasonableness of $10 million, or even $5 million, under the facts and circumstances of this case, in light of no actual injury other than attorney fees of $19,000.

In summary, the factors considered by the jury and the trial judge were those which represented pre-*Fleming Landfill* and *Haslip* standards. They do not meet the *Fleming Landfill* or *Haslip* standards and are not constitutionally permissible.

TXO respectfully submits that this case is closely analogous to *Leach v. Biscayne Oil & Gas Co.*, 289 S.E.2d 197 (W.Va. 1982) in that it relates to a type of property damage. It is not a case involving a personal slander or libel to the reputation of a person in the community; it is not a case in which the respondents alleged or proved any special damages, a lost transaction, or a lost opportunity; it is not a case of a severe personal injury with resultant continuing and oppressive medical bills; nor is it a wrongful death case. It is a case in which there were no special damages, lost sales or other transactions involved. There is no evidence that the alleged "false statement", a quitclaim deed, was known to any third parties. The only compensatory damages awarded by the jury were attorney's fees of $19,000 incurred in defense of the declaratory judgment action to [49] clear title. The jury obviously invoked passion, prejudice and shocked the conscience by awarding punitive damages in a ratio of 526 to 1.

Counsel has been unable to find a case in which an award of anything closely approximating a ratio of 526 to 1 has been upheld under a similar case with little or no actual injuries suffered by a party.[11] The award is obviously excessive and must be set aside. *Fleming Landfill.*

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[11] As an illustration of what other courts consider reasonable or excessive awards in slander of title cases, consider: *Hagan v. Liberty Loan Corp. of Ames, Iowa*, 423 N.W.2d 886 (Iowa Ct. App. 1988) (award of $32,000 in punitive damages not excessive where the plaintiffs were awarded $32,000 in actual damages); *DeLeo v. Anthony A. Nunes, Inc.*, 546 A.2d 1344 (R.I. 1988) (trial justice did not abuse discretion where he reduced a $75,000 punitive damage award to $30,000 and a compensatory damage award of $104,114 to $89,421); *Castaic Clay Mfg. Co. v. Dedes*, 240 Cal. Rptr. 652, 195 Cal.App.3d 444 (Cal. Dist. Ct. App. 1987) (punitive damage award of $200,000 not excessive where compensatory damage award amounted to $529,641.23); *Seeley v. Seymour*, 237 Cal. Rptr. 282, 190 Cal. App.3d 844 (Cal. Dist. Ct. App. 1987) (punitive damage award of $2,660,000 against an individual defendant was excessive where a number of defendants were held jointly and severally liable for $200,000 in compensatory damages); *McDonald v. Bennett*, 674 F.2d 1080 (5th Cir. 1982) (punitive damage awards of $150,000 each against numerous defendants not excessive where actual damages remaining after remittitur amounted to $98,905); *Greenspun v. Summa Corp.*, 98 Nev. 528, 655 P.2d 513 (1982) (punitive damage award of $1,000,000 not excessive in light of defendant's [Howard Hughes] financial net worth); *Madden v. Muth*, 1981 W.L. 4769 (Ohio App. 1981) (unpublished opinion) (punitive damage award of $8,000 excessive and against the weight of the evidence where compensatory damage award amounted to $6,000 and included attorney fees); *Proctor v. Gissendaner*, 579 F.2d 876 (5th Cir. 1978) (punitive damage award of $31,560 upheld where compensatory damages were $8,440); *Jumping Rainbow Ranch v. Conklin*, 167 Mont. 367, 538 P.2d 1027 (Mont. 1975) (award of $4,000 in actual damages and $1,000 in punitive damages was not excessive); and *Misco Leasing, Inc. v. Keller*, 490 F.2d 545 (10th Cir. 1974) (punitive damage award of $10,000 not excessive where actual damages amounted to $6,572.13).